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# Drug Testing in the Workplace: Sacrificing Fundamental Rights in the War on Drugs

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# **DRUG TESTING IN THE WORKPLACE: SACRIFICING FUNDAMENTAL RIGHTS IN THE WAR ON DRUGS?**

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## **I. INTRODUCTION**

The sudden, increased practice of screening employees for possible drug use has given rise to substantial controversy surrounding the issue. There are many competing interests at stake. Many employers feel that a drug screening program will increase productivity among their workers and will safeguard the work environment. On the other hand, many employees feel that such a procedure is an unreasonable invasion of privacy and therefore should be prohibited by law. Employees are also concerned about the validity and reliability of such tests in that results may be inaccurate and a positive

test might not always indicate that an employee is impaired on the job.<sup>1</sup>

Private employees are not provided the same legal protection as public employees. The constitutional guarantees of this country apply only to governmental actions and are therefore implicated in drug testing programs for both federal and state employees. Employees in the private sector, however, are not afforded the same constitutional protection; therefore, although they may have the same grievances about drug testing as public employees, private employees are not granted the same protection under federal law.

On September 15, 1986, former President Ronald Reagan issued Executive Order 12564, which required that all Federal employees within the executive branch holding "sensitive" job positions be tested for illegal drug use.<sup>2</sup> One goal was to provide an example for the private workforce to follow.<sup>3</sup> Now, hundreds of private employers, including about one-fourth of the Fortune 500 companies, have initiated testing programs to combat illicit drug use.<sup>4</sup>

Since government implementation, several drug testing programs have been challenged in the lower courts on the theory that such programs should be prohibited by the fourth amendment's protection against unreasonable searches and seizures. Recently, two circuit court cases which resulted in a split of authority on the subject were decided by the Supreme Court. The cases are *National Treasury Employees Union v. Von Raab*<sup>5</sup> and *Skinner v. Railway Labor Executives' Association*.<sup>6</sup> Although the facts of each differed, both cases involved a governmental scheme to test employees for drug use. In each, the Court effectively determined that a public interest was at stake and, accordingly, held such an interest to be more compelling than that of an individual's right to privacy. The holdings in these most recent cases demonstrate a willingness on the Court's

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1. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (1985).

2. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

3. 22 WEEKLY COMP. PRES. DOC. 1041 (Aug. 4, 1986).

4. Chapman, *The Ruckus over Medical Testing*, FORTUNE, Aug. 19, 1985, at 58.

5. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

6. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

behalf to limit the extent of an individual's right to be secure in his person from unreasonable searches and seizures, as guaranteed by the fourth amendment.

## II. STATEMENT OF THE CASES

*National Treasury Employees Union v. Van Raab*<sup>7</sup> involved a suit brought by the National Treasury Employees Union against the Commissioner of the United States Customs Service to prevent the implementation of a drug testing program. The program was designed to screen for drug use employees seeking promotion to certain "sensitive" positions. The program would require urinalysis tests from Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction, requiring the carrying of a firearm, or involving the handling of "classified" material.<sup>8</sup> Customs employees who tested positive for drugs and could not offer satisfactory explanations would be dismissed from the Service.<sup>9</sup> However, the results would not be provided to any other agency, including criminal prosecutors, without the employee's written permission.<sup>10</sup> Petitioners, a union of federal employees and a union official, sought an injunction and challenged the constitutionality of the program. The United States District Court for the Eastern District of Louisiana granted the petition for injunctive and declaratory relief, stating that "the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy."<sup>11</sup> The United States Court of Appeals for the Fifth Circuit vacated the district court's injunction and held, *inter alia*, that the drug testing program was reasonable and therefore constitutional.<sup>12</sup> The appellate court decided that the objectives of the Service in implementing a drug screening program were justified because of the government's interest in ensuring the integrity of the Service.<sup>13</sup>

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7. *Von Raab*, 109 S. Ct. 1384.

8. *Id.* at 1388.

9. *Id.* at 1389.

10. *Id.*

11. *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 387 (E.D. La. 1986).

12. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987).

13. *Id.* at 178.

The court stated that employees who use drugs may seriously frustrate the Service's efforts to enforce the drug laws because employees with drug habits are more susceptible to bribery, are tempted to divert illegal drug shipments for their own use, and may endanger the safety of others, as well as themselves, when they are impaired in their job performance.<sup>14</sup> In a five-to-four decision, the Supreme Court affirmed that part of the Fifth Circuit's judgment which upheld the testing of employees directly involved in drug interdiction or those required to carry firearms, but vacated the judgment to the extent that it upheld the testing of applicants for positions involving the handling of classified materials.<sup>15</sup>

In *Skinner v. Railway Labor Executives' Association*,<sup>16</sup> respondents, the Railway Labor Executives' Association and various member labor organizations, challenged the constitutionality of Federal Railroad Administration regulations requiring employees to submit to blood and urine tests after certain train accidents, incidents, and rule violations. The United States District Court for the Northern District of California granted summary judgment in petitioners' favor.<sup>17</sup> The court held that although railroad employees deserve protection against bodily intrusions under the fourth amendment, this interest is outweighed by the government's interest in promoting safety in railway transportation.<sup>18</sup> The Ninth Circuit Court of Appeals reversed the district court's ruling.<sup>19</sup> The court held that drug tests which are administered without a reasonable suspicion that the tests will reveal evidence of current drug or alcohol impairment are unconstitutional under the fourth amendment.<sup>20</sup> The Supreme Court, after granting certiorari, held that such tests are in fact reasonable within the meaning of the fourth amendment and accordingly reversed.<sup>21</sup>

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14. *Id.*

15. *Von Raab*, 109 S. Ct. at 1390.

16. *Skinner*, 109 S. Ct. 1402.

17. *Id.* at 1410.

18. *Id.*

19. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.*, *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989).

20. *Id.*

21. *Skinner*, 109 S. Ct. at 1422.

### III. PRIOR LAW

#### A. *The Fourth Amendment*

The fourth amendment to the United States Constitution provides that, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause. . . ."<sup>22</sup> The purpose of the fourth amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State."<sup>23</sup> The drafters of the fourth amendment recognized that in certain places and at certain times an individual has a legitimate expectation to be left alone.<sup>24</sup> This expectation of privacy, though, depends on what society considers reasonable.<sup>25</sup> Subjective expectations of privacy that are unreasonable or "illegitimate" receive no protection.<sup>26</sup>

#### B. *Application of Search and Seizure to Drug Testing*

If the government infringes upon a "reasonable" right, a search has occurred.<sup>27</sup> If the government "meaningfully" interferes with an individual's liberty or possessory interest, a seizure has occurred.<sup>28</sup> For all purposes, any drug test that is administered by analyzing one's blood or urine is, at minimum, a search because one's bodily fluids are personal in nature and the individual should have the right to dispose or withhold these fluids as he or she sees fit.<sup>29</sup>

22. U.S. CONST. amend. IV.

23. *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)).

24. *Id.* at 758; *See also Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

25. *United States v. Jacobson*, 466 U.S. 109, 113 (1984); *See also New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) and *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

26. *T.L.O.*, 469 U.S. at 338; *See also Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Hudson*, 468 U.S. 517.

27. *Jacobson*, 466 U.S. at 113.

28. *Id.*

29. Whether or not a seizure occurs during a drug test is unresolved because it is difficult to perceive blood or urine as being "seized" from one's possession. This issue, though, has no bearing on the constitutionality of drug testing if such testing has already been determined to be a search. *See Schmerber v. California*, 384 U.S. 757 (1966) (The court held blood-alcohol testing a fourth amendment search and seizure); *Cupp v. Murphy*, 412 U.S. 291 (1973) (fingernail scrapings); *McDonald v. Hunter*, 612 F. Supp. 112, 1127 (D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); *see also Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

### C. Reasonableness of a Search as Defined by the Warrant Clause

The fourth amendment only protects the individual from searches and seizures that are unreasonable.<sup>30</sup> In *United States v. United States District Court*,<sup>31</sup> the Supreme Court said, "[t]hough the Fourth Amendment speaks broadly of 'unreasonable searches and seizures', the definition of reasonableness turns, at least in part, on the more specific commands of the 'warrant clause' . . . [that] no warrants shall issue, but upon probable cause."<sup>32</sup> Accordingly, a search conducted without a warrant is *per se* unreasonable.<sup>33</sup>

### D. Warrantless Searches Requiring Probable Cause

The Court has been willing to ignore the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search"<sup>34</sup> or when the imposition of a warrant would conflict with the routine conduct of business and would not serve the ordinary needs of law enforcement.<sup>35</sup> Nevertheless, "[i]n enforcing the Fourth Amendment's protection against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."<sup>36</sup> Therefore, "a search, even one that may permissibly be carried out without a warrant, must be based upon 'probable cause' to believe that a violation of the law has occurred."<sup>37</sup>

### E. Reducing the Standard of Probable Cause

In the past, the Court has relied on its review of criminal cases in order to determine the correct application of the fourth amend-

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30. *T.L.O.*, 469 U.S. at 340-41.

31. *United States v. United States District Court*, 407 U.S. 297 (1971).

32. *Id.* at 315.

33. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

34. *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967).

35. *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987).

36. *Sanchez v. United States*, 413 U.S. 266, 269-70 (1973) (quoting *Chamber v. Maroney*, 399 U.S. 42, 51 (1970) (White, J., concurring)).

37. *T.L.O.*, 469 U.S. at 340; See *Sanchez*, 413 U.S. at 273; *Sibron v. New York*, 392 U.S. 40, 62-66 (1968).

ment.<sup>38</sup> Where an employee's right to privacy is concerned, a lesser standard should not be applied "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.'"<sup>39</sup> Furthermore, "it would be 'anomalous to say that the individual . . . [i]s fully protected by the Fourth Amendment only when [he] is suspected of criminal behavior.'"<sup>40</sup>

However, the Court has been willing to forego the warrant and probable cause requirements where the search or seizure at issue constitutes a limited intrusion.<sup>41</sup> "We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime."<sup>42</sup> Yet the Court has also said that even a "limited search of the person is a substantial invasion of privacy."<sup>43</sup>

*Terry v. Ohio*<sup>44</sup> was one of the first cases in which the Court reduced the minimum standard for a reasonable search from "probable cause" to "reasonable suspicion" where the search was only minimally intrusive. There, a detective suspected three men of "casing a job" when two men were observed walking back and forth in front of a store window and conferring with a third man a couple of blocks away.<sup>45</sup> The officer approached the three men, identified

38. See *Arizona v. Hicks*, 480 U.S. 321 (1987); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Place*, 462 U.S. 109 (1984); *Ybarra v. Illinois*, 440 U.S. 85 (1979); *United States v. Martinez-Fuerte*, 429 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 266 (1973); *Sanchez*, 413 U.S. 266; *Schneekloth*, 412 U.S. 218; *Terry v. Ohio*, 392 U.S. (1968); *Schmerber*, 384 U.S. 757; *Henry v. United States*, 361 U.S. 98 (1959); *Carroll v. United States*, 267 U.S. 132 (1925).

39. *T.L.O.*, 469 U.S. at 335 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978)).

40. *Id.* (quoting *Camara*, 387 U.S. at 530).

41. See, e.g., *Martinez-Fuerte*, 428 U.S. 543 (fixed check points where driver and passengers were questioned); *Terry*, 392 U.S. 1 (frisk consisting of a limited search of outer clothing); See also *Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (Court recently observed that an exception to the probable cause standard is justified only where government conduct at issue is minimally intrusive); *Ortiz*, 422 U.S. 891; *Warden v. Hayden*, 387 U.S. 294 (1967); *Carroll*, 267 U.S. 132.

42. *Hicks*, 480 U.S. 321, 326.

43. *T.L.O.*, 469 U.S. at 337.

44. *Terry*, 392 U.S. 1 (1968).

45. *Id.* at 6.



himself as a policeman and asked for their names, whereupon he conducted a frisk consisting of a limited search of their outer clothing and found that two of the men had loaded guns.<sup>46</sup> Both suspects were charged with carrying concealed weapons.<sup>47</sup> The Supreme Court upheld their conviction on the theory that the search was reasonable under circumstances warranting an immediate danger, regardless of whether there was probable cause or absolute certainty to believe that the individuals were armed.<sup>48</sup> The Court rested its decision mainly on the experienced officer's reasonable belief that the men were armed and the fact that the search was minimally intrusive.<sup>49</sup> The Court said that in order to test the reasonableness of a search one must consider "whether the action [is] justified at its inception," and is "reasonably related in scope to the circumstances which [justify] the interference in the first place."<sup>50</sup>

In *New Jersey v. T.L.O.*,<sup>51</sup> where a student's purse and locker were subjected to a search based on less than probable cause, the Court relied on the *Terry* doctrine in its decision upholding the constitutionality of the search. The Court held that when there are reasonable grounds for suspecting that an inspection will produce evidence of misconduct, then a search is "justified at its inception."<sup>52</sup> If the manner in which a search is conducted is "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the infraction," then a search is permissible in its scope.<sup>53</sup> Accordingly, because the search in question was found to be reasonable under the *Terry* test, the Court held that it did not violate the fourth amendment.<sup>54</sup>

In *O'Connor v. Ortega*,<sup>55</sup> the Court held that a public employer could inspect an employee's office, desk, or file cabinet without a

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46. *Id.* at 6-7.

47. *Id.* at 7.

48. *Id.* at 20-27.

49. *Id.*

50. *Id.* at 20.

51. *T.L.O.*, 469 U.S. 325.

52. *Id.* at 342.

53. *Id.*

54. *Id.* at 347-48.

55. *O'Connor*, 480 U.S. 709.

warrant or probable cause; but this search was viewed as a “‘relatively limited invasion’ of employee privacy.”<sup>56</sup> Thus, under certain conditions, the Constitution allows a limited search where the facts do not constitute probable cause.<sup>57</sup> Because of the governmental interest at stake, such minimum intrusion is reasonable under circumstances that provoke suspicion.<sup>58</sup>

Still, the Court has recognized that intrusions into the human body implicate the “most personal and deep-rooted expectations of privacy”<sup>59</sup> and therefore require a “discerning inquiry into the facts and circumstances to determine whether the intrusion [is] justifiable.”<sup>60</sup> Such an inquiry should consider whether there is reason to suspect that the search will turn up evidence of misconduct. On the other hand, while “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of suspicion.”<sup>61</sup> Hence, “where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard.”<sup>62</sup>

Many lower courts, though, have not measured the constitutionality of drug testing programs upon the existence of any such standard, i.e., minimum suspicion; instead, by simply balancing the interests involved, they have judged whether such tests were “unreasonable” under the circumstances.<sup>63</sup>

In one lower court case, *Jones v. McKenzie*,<sup>64</sup> the appellee challenged a mandatory drug testing program initiated by the District

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56. *Id.* at 725 (quoting *Camara*, 387 U.S. at 537).

57. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

58. *Id.*

59. *Camara*, 387 U.S. at 539; *cf.*, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

60. *Winston*, 470 U.S. at 760; *see also Schmerber*, 384 U.S. 757, 767-68.

61. *Martinez-Fuerte*, 428 U.S. 543, 560-61.

62. *T.L.O.*, 469 U.S. at 341.

63. *See, e.g., Policeman's Benevolent Ass'n, Local 318 v. Township of Washington*, 672 F. Supp. 779, 785-86 (D.N.J. 1987); *McDowell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987); *Lovorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Cupua*, 643 F. Supp. 1507, 1520.

64. *McKenzie*, 833 F.2d 335.

of Columbia School System for employees in its Transportation Branch. The district court enjoined the program because it was administered without "probable cause."<sup>65</sup> On appeal, the question presented before the District of Columbia Circuit Court was whether a school district could administer any drug test without probable cause.<sup>66</sup> However, the court failed to address the probable cause issue (although it did acknowledge evidence of drug abuse in the Transportation Branch) and instead relied strictly on the *Terry* test to determine whether the search was reasonable under the circumstances.<sup>67</sup> The court concluded that such a test, administered by a school system, is not unreasonable where: a) the purpose is to ensure the physical safety of young school children, b) the testing is conducted as part of a routine medical examination, and c) the test has a nexus to the employer's legitimate concern about safety.<sup>68</sup>

It would seem then, in this court's opinion, that a balancing test is all that is required to determine the reasonableness of a search; but "the Framers of the [Fourth] Amendment balanced the interests involved and decided that a [search or] seizure is reasonable only if supported by a judicial warrant based on probable cause."<sup>69</sup> Although that initial standard may now be reduced to what is described as "reasonable suspicion," even that "does not disappear merely because the government has the right to make reasonable intrusions in its capacity as an employer."<sup>70</sup>

Only after probable cause or reasonable suspicion is established should a balancing test be applied to determine whether the search is reasonable. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for a particular search against the invasion of personal rights that the search entails."<sup>71</sup> To determine the standard of reasonableness one must "bal-

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65. *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986).

66. *McKenzie*, 833 F.2d at 339.

67. *Id.* at 338-39.

68. *Id.* at 341.

69. *Place*, 462 U.S. 696, 722 (Blackmun, J., concurring).

70. *O'Connor*, 480 U.S. at 717-18 (quoting Scalia, J., concurring at 731).

71. *Bell v. Wolfish*, 441 U.S. 520, 559 (1970).

ance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."<sup>72</sup>

#### F. *Closely Regulated Industry Exception to the Probable Cause Requirement*

When the government inspects a closely regulated industry it is excepted from the probable cause requirement, or any lesser standard. "Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise."<sup>73</sup> "[T]he appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied."<sup>74</sup> Hence, the traditional warrant and probable cause standards are lowered in this context because any expectation of privacy is limited in a "closely regulated" industry where the risk of danger is inherent by the nature of the industry.<sup>75</sup>

"In situations of 'special need' where privacy interests of the owner are weakened and government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the Fourth Amendment."<sup>76</sup> Needless to say, "pervasively regulated" businesses long subject to close supervision and inspection are excepted from the warrant clause.<sup>77</sup> The only distinction is that in traditional closely regulated industry cases the government has been allowed to inspect property, not persons. On the other hand, where the government has been allowed to search persons without adherence to the warrant clause, such invasions were held minimally intrusive. Therefore, when the government embarks upon a major intrusion into the lives of

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72. *Place*, 462 U.S. at 703.

73. *Marshall*, 436 U.S. 307, 314.

74. *O'Connor*, 480 U.S. at 723; see *Marshall*, 436 U.S. at 320; *Camara*, 387 U.S. at 538.

75. *New York v. Burger*, 482 U.S. 691, 699 (1987).

76. *Id.*

77. *U.S. v. Biswell*, 406 U.S. 311, 316 (1972).

employees in a closely regulated industry by administering a drug testing program, conflicting standards of case law become applicable. In *Shoemaker v. Handel*,<sup>78</sup> though, the Third Circuit had no problem in upholding the random testing of racehorse jockeys on the basis of the "pervasively regulated industry" doctrine. The court merely reasoned that jockeys had reduced expectations of privacy in such a closely regulated business because they knew that the New Jersey Racing Commission had a strong interest in assuring public confidence in the integrity of the industry.<sup>79</sup>

### G. Consent

Another exception to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.<sup>80</sup> There are certain limitations, however.

When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, expressed or implied. Voluntariness is a question of fact to be determined from all the circumstances . . . .<sup>81</sup>

"Consent" may apply to federal drug testing programs because the employee knows of the drug test in advance.<sup>82</sup> But in a recent District of Columbia court case, *National Federation of Federal Employees v. Weinberger*,<sup>83</sup> the court said that "[a] search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment."<sup>84</sup> The court went on to say that "[a]dvance notice of the employer's condition, however, may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy."<sup>85</sup>

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78. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

79. *Id.* at 1142.

80. See *Martinez-Fuerte*, 482 U.S. 543.

81. *Schneekloth*, 412 U.S. 218, 219 (citations omitted).

82. *Id.* at 248-49.

83. *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987).

84. *Id.* at 943.

85. *Id.*

#### IV. PRACTICAL INTERESTS CONCERNING DRUG TESTING IN THE WORKPLACE

##### A. *Competing Interests Between Employers and Employees*

According to one source, in 1986 alone drug abuse cost this country over \$70 billion in lost worker production.<sup>86</sup> It has also been reported that between five and twenty-five percent of the workers in this country have some form of alcohol or other drug abuse problem.<sup>87</sup> Statistics show that approximately four million Americans use cocaine, and at least twenty million Americans use marijuana or hashish.<sup>88</sup> It is not surprising, then, that many employers have decided to test their employees for drug use.

Employers that favor drug testing assert that impairment on the job results in poor job performance and may cause more accidents to occur, and that drug use in general causes increased absenteeism, employee theft for the purpose of supporting expensive drug habits, and the buying, selling and possession of drugs in the workplace.<sup>89</sup> Therefore, in light of all the foreseeable risks that are connected to drug use, many employers perceive drug testing as a necessary means to prevent such harms from occurring in the workplace.

Employees, on the other hand, may resent being tested, even if they do not use drugs.<sup>90</sup> The experience is both humiliating and degrading, especially for a candidate who has never evoked suspicion of drug use.<sup>91</sup> Employees are also concerned about the validity and reliability of the test results,<sup>92</sup> and the fact that such tests may reveal physiological secrets beyond the question of whether the employee is an illicit drug user.<sup>93</sup>

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86. Willard, *Toward a Drug-Free Workplace*, 34 FED. B. NEWS & J. 74 (1987).

87. Comment, *Constitutional Law: The Fourth Amendment and Drug Testing in the Workplace*, 10 HARV. J.L. & PUB. POL'Y 762, 763 (1987).

88. Comment, "Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" Cries a Lone Voice in A Wilderness of Opposition, 1987 B.Y.U. L. REV. 1239 (1987).

89. Castro, *Battling the Energy Within: Companies Fight to Drive Illegal Drugs Out of the Workplace*, TIME, Mar. 17, 1986, at 53.

90. Chapman, *The Ruckus Over Medical Testing*, FORTUNE, Aug. 19, 1985, at 59.

91. Neal, *Mandatory Drug Testing: Court Weighs Civil Liberties Objections*, A.B.A. J., Oct. 1, 1988, at 63.

92. Chapman, *supra* note 90 at 57-59.

93. In *National Treasury Employees v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), the court said:

## B. Test Accuracy

Presently there are three basic methods for detecting drug use through biochemical urinalysis: 1) the enzyme multiplied immunoassay (EMIT) and the radioimmunoassay tests (RIA), 2) the gas chromatography test (GC), and 3) the mass spectrometer test (MS).<sup>94</sup> Each test requires the operation of different testing equipment, but the premise underlying each test is the same: drugs that are inhaled or ingested are chemically broken down by the body into metabolites, which are detected in urine samples.<sup>95</sup>

Claims have been made that a urine sample will react positively for a whole array of substances ranging from legal prescription and over-the-counter drugs to certain foods.<sup>96</sup> Experts in the drug testing field, though, regard the testing procedures as highly accurate when supervised by qualified and trained personnel.<sup>97</sup> Generally speaking, drug tests are estimated to be at least ninety-eight percent accurate, and, if confirmed by follow-up tests, the results are considered virtually one hundred percent accurate.<sup>98</sup> These estimates, however, do not account for tampering or mishandling of test samples, or for "false positives" which indicate a person is taking a drug when they really are not. Such results arise from the cross-reaction of known or unknown compounds.<sup>99</sup> Also, any procedure performed by man is bound to be subject to human error. Under former President Reagan's proposed plan, over one million federal employees in "sensitive" job positions would be tested for drug use.<sup>100</sup> If the tests are

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Urine testing may disclose not only the presence of drug traces but much additional information about an employee whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant. Even tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms.

*Id.* at 175-76.

94. Rector, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1014 (1986).

95. *Id.*

96. Randall, *Drug Testing for Illegal Substance*, (Congressional Research Service Report For Congress, January 20, 1987, at 5) (available in the Library of Congress).

97. *Id.*

98. *Id.*

99. *Id.* at 6.

100. *Id.* at 1.

merely one percent inaccurate, roughly 10,000 employees could be falsely accused of using illegal drugs.

### C. Reliability

Finally, although a drug test may determine that a person has taken illegal drugs, a positive test indicates only the presence of drug residue; it does not show that an individual is impaired in his or her job performance.<sup>101</sup> Such tests are also highly sensitive.<sup>102</sup> Apparently, some tests can detect usage after two weeks of abstinence, and may even register positive results for a person who merely breathes marijuana smoke.<sup>103</sup> Accordingly, positive test results do not indicate a proper nexus between an employee's drug use and its effect on his job related activities.

## V. ANALYSIS

In *National Treasury Employees Union v. Van Raab*,<sup>104</sup> the issue before the Court was whether or not the United States Customs Service's requirement of a urinalysis test for employees seeking transfer or promotion to certain positions violates the employees' fourth amendment rights.

The Court first determined that the drug testing program implemented by the Service was indeed a search under the fourth amendment because the urinalysis test infringed upon an employee's reasonable expectation of privacy.<sup>105</sup> The Court then discussed whether the program complied with the fourth amendment's reasonableness standard. The Court recognized that the reasonableness standard is met when a search is supported by a warrant which is issued upon probable cause, but insisted that "neither a warrant nor probable cause, nor indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."<sup>106</sup>

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101. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 48 (1985).

102. *Id.*

103. *Id.*

104. *Von Raab*, 109 S. Ct. 1384. The majority opinion was written by Justice Kennedy.

105. *Id.* at 1390.

106. *Id.*



[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.<sup>107</sup>

The Court further explained how a drug testing program, designed to deter drug use among those eligible for promotion to sensitive positions within the Service, may be administered on the basis of a special need that justifies a departure from the ordinary warrant and probable cause requirements.<sup>108</sup> In fact, the Court initially suggested that this was simply another case wherein the constitutional requirements of the fourth amendment could be dispensed with in order to serve the "important" needs of government.

The Court considered the warrant requirement unnecessary for the Service's drug testing program because such a requirement "would serve only to divert valuable agency resources from the Service's primary mission[,] . . . [which] would be compromised if [warrants were required] in connection with routine, yet sensitive, employment decisions."<sup>109</sup> Furthermore, because the surrounding circumstances and the permissible limits of such intrusions are narrowly and specifically defined, the Court stated that a warrant would provide little or no additional protection of personal privacy.<sup>110</sup> The Court reasoned that employees know in advance whether or not they will be tested and are aware of the procedures that the Service must follow.<sup>111</sup> Additionally, the Court noted that such tests are not subject to the discretion of officials in the field.<sup>112</sup> Thus, the Court reasoned that there are not any special facts for a neutral magistrate to evaluate, since such testing becomes automatic when an employee applies for a covered position.<sup>113</sup>

The Court's reasoning at this stage of its opinion is seriously flawed. Such is the case because the issuance of a warrant generally

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107. *Id.*

108. *Id.* at 1390-91.

109. *Id.* at 1391.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

requires that it be based upon probable cause. The Court, however, made no mention of the normal requirement of probable cause in the early stages of its opinion. Rather, the Court stated superficially that "a warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope."<sup>114</sup> Although this statement is correct, it does not consider the fact that probable cause must first be established in order for a warrant to be valid. Therefore, regardless of whether there are any "special facts" involved in a government search, a neutral magistrate may not issue a warrant in the first place unless it is based upon probable cause. Nonetheless, the Court concluded that a warrant is not always required in connection with a "routine, yet sensitive" employment decision.<sup>115</sup> Such broad language suggests that the government's authority to conduct warrantless searches upon its employees is without limit, so long as the warrantless search is part of a conceived plan.

However, the Court did acknowledge that even where a warrant is not required, a search must ordinarily be based on probable cause.<sup>116</sup> Nonetheless, it explained that the government could dispense with the probable cause requirement in situations that demand a safeguard against the development of dangerous conditions.<sup>117</sup>

Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.<sup>118</sup>

In previous cases where the Court has relaxed the probable cause standard, it was established that the search at issue constituted a limited intrusion. A drug test, on the other hand, involves a substantial invasion of privacy.<sup>119</sup> Thus, in light of this distinction, the Service's testing of its employees for drug use should not be justified without probable cause.

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1392.

118. *Id.*

119. *See supra* note 43 and accompanying text.

The Court reasoned that the government has a compelling interest in ensuring the Service's integrity and preventing the risk of harm caused to the public by the potential use of deadly force by employees whose perception and judgment are impaired.<sup>120</sup> The majority opinion accepted the Commissioner's argument, which contended that drug-using employees may be "unsympathetic to [the government's] mission of interdicting narcotics;"<sup>121</sup> accordingly, such employees might frustrate the Service's efforts to enforce the drug laws.

A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals.<sup>122</sup>

Of additional import was the Court's concern that employees who are required to carry firearms may endanger the safety of others when they are impaired on their job performance.<sup>123</sup>

The aforementioned justifications for screening employees for drug use were held to outweigh the employees' interests in protecting their individual privacy.<sup>124</sup> In support of this conclusion, the Court stated that employees seeking promotion to positions involving drug interdiction or requiring the incumbent to carry a firearm have a diminished expectation of privacy in circumstances where the employees "reasonably should expect effective inquiry into their fitness and probity."<sup>125</sup>

The petitioners argued that the program is not justified in two respects: 1) it is not based on a belief that it will uncover evidence of drug use by covered employees, and 2) its screening function is ineffective because employees can avoid discovery by temporarily abstaining from drug use before the test date or by surreptitiously adulterating their urine samples.<sup>126</sup> The Court determined that both arguments were unpersuasive.<sup>127</sup>

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120. *Von Raab*, at 1393.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1394.

126. *Id.* at 1394-95.

127. *Id.* at 1395.

In response to petitioners' first argument, the majority claimed that even though there is little reason to believe that the testing will reveal much evidence of actual drug use, it is primarily designed to prevent illegal drug users from being promoted to sensitive positions.<sup>128</sup>

Indeed, the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risk of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.<sup>129</sup>

The Court's argument, however, is equally unpersuasive. According to the dissenting opinion, the Court's argument is "supported by nothing but speculation, and not very plausible speculation at that."<sup>130</sup>

What is absent in the Government's justifications, notably absent, revealingly absent, and . . . dispositively absent, is the recitation of *even a single instance* in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribe-taking, or poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.<sup>131</sup>

The Court simply assumed that drug users were more susceptible to illegal inducements than non-users. However, the majority proffered no tangible proof in support of this unfounded assumption.

In response to petitioners' second argument, regarding a user's ability to avoid detection through abstinence, the Court claimed that the case was overstated.<sup>132</sup>

[A]ddicts may be unable to abstain for a limited period of time or be unaware of the "fade-away effect" of certain drugs. More importantly, the avoidance

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128. *Id.*

129. *Id.*

130. *Id.* at 1399 (Scalia, J., dissenting). Justice Marshall, Brennan, Scalia and Stevens all dissented in the case. Justice Marshall, with whom Justice Brennan joined, wrote one dissenting opinion, and Justice Scalia, with whom Justice Stevens joined, wrote the other. Marshall's dissent, however, merely refers the reader to his dissent in *Skinner*, 109 S. Ct. at 1422; therefore, Scalia's dissent will be referred to as the dissenting opinion in this case.

131. *Id.* at 1399-1400.

132. *Id.* at 1396.

techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. A particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy, and, in any event, the information is not likely to be known to the employee.<sup>133</sup>

The Court's argument is inconsistent; if an addict cannot abstain from usage for even a short period of time, it stands to reason that his work performance will be noticeably affected. Thus, a blanket screening program would not be required to detect usage under these circumstances.

The petitioners' final suggestion that drug users could adulterate their urine specimens was also refuted in light of the precautions taken by the Service to verify the integrity of each sample before analysis.<sup>134</sup>

Thus, the Court concluded that the government's interests in protecting its borders and the interests in public safety outweigh the privacy expectations of employees seeking promotion to positions involving the interdiction of illegal drugs or requiring the incumbent to carry a firearm.<sup>135</sup> Hence, the testing of these employees was held to be reasonable under the fourth amendment.<sup>136</sup>

The Court, however, found the record insufficient for the purpose of deciding whether the Service's testing of those who apply for promotion to positions where they handle "classified" information was reasonable.<sup>137</sup> Employees holding the following titles would be tested under the Service's scheme: "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger."<sup>138</sup> The Court felt that the Service had defined this category of employees more broadly than necessary to meet the purposes of the Commissioner's directive because it is unclear whether persons occupying those positions are likely to gain access to sensitive information.<sup>139</sup>

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1397.

139. *Id.*

Thus, the Court upheld the testing of employees seeking transfer or promotion to positions that directly involve drug interdiction or positions which require the incumbent to carry a firearm. However, the Court remanded the case to the court of appeals in order to determine which applicants for positions involving the handling of "classified" materials should reasonably be tested under the Service's scheme.<sup>140</sup>

The dissent stated that the Court was unjustified in its holding because there was not any evidence which would prove that Customs employees were using drugs.<sup>141</sup> The Commissioner himself stated that he believed that the Service was largely drug-free.<sup>142</sup> This is evident from the fact that of the 3,600 employees tested, only five tested positive for drugs.<sup>143</sup>

The dissent concluded that only one reason exists for the majority holdings in favor of drug testing, but that it was not a reason upon which the Court was willing to rely.<sup>144</sup> The only plausible explanation, in the dissenters' view, is that the Court submitted to political pressure, allowing the government to show the world that it was serious about its "war on drugs."<sup>145</sup> The dissent found this justification unacceptable.<sup>146</sup>

[T]he impairment of individual liberties cannot be the means of making a point . . . [E]ven symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.<sup>147</sup>

One of the dissent's leading concerns was that the Court's holding now approves drug testing for all federal employees having access to confidential information.<sup>148</sup> Such a realization is frightening, but the impact of the Court's holding is greater than that. It is inevitable that many state agencies will now follow suit, as well as private

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140. *Id.* at 1397-98.

141. *Id.* at 1398 (Scalia, J., dissenting).

142. *Id.* at 1400.

143. *Id.*

144. *Id.* at 1401.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

employers who have not yet implemented programs of their own. Soon, the day will come where virtually every employee will be drug-tested in one way or another; but will employers stop at that? Perhaps there are other things that an employer would like to find out about his employees, as well. Now that the drug testing of employees has become an acceptable intrusion of privacy, one only has to imagine the kind of intrusions which will be acceptable in the future. Only the test of time will tell.

In *Skinner v. Railway Labor Executives' Association*,<sup>149</sup> the issue before the Court was whether Federal Railroad Administration (FRA) regulations requiring employees to submit to blood and urine tests after certain train accidents violate the fourth amendment. Applying the same principles set forth in *Von Raab*,<sup>150</sup> the Court determined that the toxicological testing contemplated by the regulations does not unduly infringe upon the justifiable expectations of privacy of covered employees.<sup>151</sup> Therefore, the Court held that the challenged regulations do not violate the fourth amendment.<sup>152</sup>

The Court determined that the fourth amendment's prohibition of unreasonable searches and seizures is applicable to drug tests implemented by a government-developed regulation.<sup>153</sup> The Court explained that, ordinarily, a search is unreasonable unless it is supported by a warrant issued upon probable cause, but that there are exceptions to this rule in certain limited situations "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'"<sup>154</sup>

When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context.<sup>155</sup>

The Court reasoned that the government's interest in regulating the conduct of railroad employees to ensure safety justified prohibiting

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149. *Skinner*, 109 S. Ct. 1402 (1989). Justice Kennedy wrote the decision for the majority.

150. *Von Raab*, 109 S. Ct. 1384.

151. *Skinner*, 109 S. Ct. *Id.* at 1421.

152. *Id.* at 1422.

153. *Id.* at 1411.

154. *Id.* at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, , 107 S. Ct. 3164, 3167 (1987) (quoting *T.L.O.*, 469 U.S. at 351)).

155. *Id.*

such employees from using alcohol or drugs while on duty. Thus, the government's interest "present[ed a] 'special need' beyond normal law enforcement [justifying] a departure from the usual warrant and probable cause requirements."<sup>156</sup>

The Court discussed the warrant and probable cause requirement separately to further justify its "special needs" doctrine. In its discussion of the warrant requirement, the Court added that such a requirement might frustrate the purpose behind the government's objective because alcohol and other drugs are eliminated from the blood stream at a constant rate; thus, the delay necessary to procure a warrant might result in the destruction of evidence.<sup>157</sup>

Having abandoned the warrant requirement, the Court discussed probable cause. However, the issue was addressed only in terms of "individualized suspicion," which is normally distinguished as a lesser standard than that of probable cause. Nevertheless, the Court used the terms synonymously in its analysis. The Court stated that

[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.<sup>158</sup>

The Court reasoned that the drug tests contemplated by the FRA regulations constituted only a limited interference with covered employees' reasonable expectations of privacy but furthered the government's important interest in ensuring railroad safety.<sup>159</sup> Thus, the Court held that such testing fell within the limited exception to the probable cause requirement.<sup>160</sup> This argument, however, is based on a misconception of the law as established by earlier cases. The majority relied on language in *Schmerber v. California*<sup>161</sup> which implied that the intrusion imposed by a blood test is not significant because "such 'tests are commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of

156. *Id.* (quoting *Griffin*, 483 U.S. at , 107 S. Ct. at 3168).

157. *Id.* at 1416.

158. *Id.* at 1417.

159. *Id.* at 1417, 1419.

160. *Id.* at 1420.

161. *Schmerber*, 384 U.S. 757.



blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.’’<sup>162</sup> Accordingly, the Court argued that *Schmerber* “confirms ‘society’s judgment that blood tests do not constitute an unduly extensive imposition on an individual’s privacy and bodily integrity.’”<sup>163</sup> However, the dissent focused on the language in *Schmerber* which recognized the following:

[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require lawoffices to suffer the risk that such evidence may disappear . . . .’’<sup>164</sup>

Hence, *Schmerber* may be appropriately cited for the proposition that in the absence of at least some particularized suspicion, compulsory blood tests are not permitted under the fourth amendment.<sup>165</sup> The majority’s reliance upon specific language contained in *Schmerber* is unfounded in that the particular language was clearly taken out of context.<sup>166</sup>

The Court has, in decisions subsequent to *Schmerber*, recognized that even a limited search of the person “constitutes a severe, though brief, intrusion upon cherished personal security.”<sup>167</sup> Therefore, the majority’s assertion that drug tests are minimally intrusive is, according to the dissent, “nothing short of startling.”<sup>168</sup> Compelling an individual to submit to a drug test upon demand intrudes deeply on privacy and bodily integrity. Additionally, it should be noted that such testing will not only uncover drug or alcohol use, but will also reveal or indicate conditions such as diabetes, epilepsy, and clinical depression.<sup>169</sup> Of additional import are the facts that a positive test indicates only the presence of drug residue and that a pos-

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162. *Skinner*, 109 S. Ct. at 1417 (quoting *Schmerber*, 384 U.S. at 771).

163. *Id.* (quoting *Winston*, 470 U.S. at 762).

164. *Id.* at 1427 (Marshall, J., dissenting) (quoting *Schmerber*, 384 U.S. at 769-70).

165. *Id.* at 1427-28.

166. *Id.* at 1428 n.7.

167. *Terry*, 392 U.S. 1, 24-25.

168. *Skinner*, at 1429 (Marshall, J., dissenting).

169. *Id.*

itive test does not measure current impairment.<sup>170</sup> Therefore, drug testing “‘may provide Governmental officials with a periscope through which they can peer into an individual’s behavior in her private life, even in her home.’”<sup>171</sup>

Recognizing that urine tests may reveal nothing more specific than the recent use of controlled substances, the Court maintained that such information would provide a basis for further investigation designed to determine whether or not an employee used drugs at a particular time.<sup>172</sup> In addition, the FRA relies principally upon the results of blood tests, which “‘unquestionably can identify very recent drug use.’”<sup>173</sup> Thus, the Court reasoned that blood and urine tests, taken together, may provide an effective means of ascertaining on-the-job impairment.<sup>174</sup>

The Court further stated that “‘the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.’”<sup>175</sup> The Court also noted that many employees are already subject to periodic physical examinations.<sup>176</sup> Consequently, the Court concluded that the testing procedures imposed by the FRA regulations “‘pose only limited threats to the justifiable expectations of privacy of covered employees.’”<sup>177</sup>

The majority’s stated line of reasoning is clearly misguided in light of prior law. Accordingly, the dissent predicted that the majority had set “‘a dangerous and ill-conceived precedent.’”<sup>178</sup>

Our decisions in the regulatory search area refute the suggestion that the heavy regulation of the railroad industry eclipses workers’ rights under the Fourth

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170. Susser, *supra* note 101.

171. *Skinner*, 109 S. Ct. *Id.* at 1427 (Marshall, J., dissenting) (quoting *McKenzie*, 266 U.S. App. D.C. at 89).

172. *Id.* at 1421.

173. *Id.*

174. *Id.*

175. *Id.* at 1418.

176. *Id.*

177. *Id.* at 1419.

178. *Id.* at 1430 (Marshall, J., dissenting).

Amendment to insist upon a showing of probable cause when their bodily fluids have been extracted. This line of cases has exclusively involved searches of employer *property*, with respect to which “[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a *proprietor* over the *stock* of such an enterprise.” Never have we intimated that regulatory searches reduce employees’ right of privacy in their *persons*.<sup>179</sup>

In light of the government’s compelling interests at stake, however, the majority determined that the “regulatory search” doctrine was applicable to the present case.<sup>180</sup> The Court reasoned that a substance-impaired railroad employee in a safety-sensitive position can cause great harm before any signs of the impairment become noticeable to supervisors or others. Recognizing that no procedure can accurately identify all impaired employees with ease and perfect accuracy, the Court concluded that FRA regulations provide an effective means by which to deter employees from using alcohol or drugs.<sup>181</sup>

The Court explained that an individualized suspicion requirement regarding drug or alcohol use would serve only to seriously impede the process of obtaining valuable information about the causes of accidents, since finding evidence that a particular employee is impaired is impracticable in the chaotic aftermath of a serious accident.<sup>182</sup> Accordingly, the Court concluded that a requirement of individualized suspicion, in these circumstances, would frustrate the government’s goal of ensuring safety in rail transportation.<sup>183</sup>

The dissent criticized the majority’s reliance on the importance of diagnosing the causes of an accident as a critical basis for upholding the FRA’s plan.<sup>184</sup> The dissenters determined that such reliance was unfounded, in light of the Court’s frequent admonition that the interest in determining the causes of a criminal episode does not justify departure from the requirements of the fourth amendment.<sup>185</sup> As in *Von Raab*, the dissenting Justices felt that the ma-

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179. *Id.* at 1429 (emphasis in original).

180. *Id.* at 1418-19.

181. *Id.* at 1419.

182. *Id.*

183. *Id.* at 1420.

184. *Id.*

185. *Id.* at 1432 (Marshall, J., dissenting).

jority's only justification for treating this case differently was that the majority was apparently "swept away by society's obsession with stopping the scourge of illegal drugs."<sup>186</sup>

Nonetheless, the Court based its conclusion on other grounds. As a result of the limited discretion exercised by the railroad employers under the regulations, and as a result of the safety interests served by drug tests in this context, as well as the diminished expectation of privacy of railroad employees in covered positions, the Court held that it is reasonable to administer such tests in the absence of a warrant and in the absence of probable cause.<sup>187</sup> Hence, the Court concluded that the drug tests contemplated by the FRA regulations are reasonable within the meaning of the fourth amendment.<sup>188</sup>

## VI. CONCLUSION

It appears that the *Von Raab* and *Skinner* decisions are the direct result of changing times and circumstances. The increasing concern in safeguarding the workplace as well as the commitment to the war on drugs serve to support measures such as drug testing in our society's attempt to deter drug use. However, Justice Holmes, in a decision rendered nearly a century ago, expressly cautioned that political climates not be the primary thrust of judicial decisions. His age-old wisdom is as applicable to the conservative Court of the 1980's as it was to the Court in 1904. Justice Holmes, in his first dissenting opinion, had the following words of caution:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, [but] because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.<sup>189</sup>

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186. *Id.*

187. *Id.* at 1433.

188. *Id.* at 1422.

189. *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

Certainly, the issue of drugs is one which is of "immediate overwhelming interest"<sup>190</sup> within our society. Nonetheless, the Court has ignored the wisdom of Holmes cautionary statements in that the public declaration of war on drugs has ultimately resulted in bending or attributing doubt to what was once a well-settled principle of law. That is, the *Von Raab* and *Skinner* Court has stripped the citizenry of one of its most basic and fundamental rights. Clearly, the fourth amendment expressly provides for protection of an individual from unreasonable searches and seizures.

That basic right, which lies at the core of the Constitution, has now been cast in doubt and has been semantically manipulated so as to dilute an individual's right to privacy, all for the sake of the political war on drugs.

The majority does not ignore the fourth amendment but does, in fact, only lend itself to a superficial reading of its express language. The Supreme Court stated that the contemplated drug tests are reasonable within the meaning of the fourth amendment. However, the meaning attributed to the fourth amendment in *Von Raab* and in *Skinner* is irreconcilable with the express language therein. For what could be more unreasonable and intrusive than the taking of an individual's bodily fluids for the purpose of determining drug usage without any basis of individualized suspicion? As sophisticated as the arts of science and technology have become, the methods of drug testing do not measure, let alone detect, degrees of current impairment. The results of said testing serve only to indicate the presence of drug residue. Thus, it is scientifically feasible for one to test positive for illegal drug use, but at the same time not exhibit any measurable degree of current impairment.

The *Skinner* majority proffered its holding on the premise or under the guise that drug testing be permitted so as to protect public safety. Ironically, though, the majority did not sufficiently address the well-known fact that drug testing does not, in any concrete manner, measure an individual's impairment. The majority merely provided that additional liberties could be taken if an individual initially

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190. *Id.*

tested positive for drug usage. Thus, the Court provided that once it is established through testing that an individual's bodily fluid contains drug residue, such result would serve as a basis for further investigatory measures. However, this approach essentially circumvents the constitutional requisite of reasonable suspicion prior to the administration of a governmental search, let alone such an intrusive measure as drug testing. Certainly, public safety is of importance. However, the Court should not haphazardly approve the implementation of patchwork solutions or uncertain remedial measures, such as drug testing, at the expense of an individual's basic constitutional rights, all for the sake of appeasing the current political regime.

While the *Von Raab* Court implied that public safety was the underlying rationale for its conclusion that drug testing be permitted, the Justices expressly provided an additional explanation. The additional justification cited as outweighing an individual's privacy interest was that of the government's interest in protecting the integrity of the Customs Service. The express citation and simultaneous recognition of such an ambiguous interest is alarming. One may easily concede that the government has a legitimate interest in protecting the integrity of the Service. However, it is disconcerting to discover that such an interest has been adjudged by our highest court as being one which surpasses the right against unwarranted searches and seizures. It is frightening that the majority placed such grave weight upon the integrity of the Service without regard for the most basic rights of the government's individual citizenry.

In light of *Skinner* and *Von Raab*, it appears that our highly conservative Supreme Court has, once again, chiseled away at the fourth amendment. The repeated denial of the express language contained in the fourth amendment has resulted in a vastly different degree of protection than that which was presumably intended by its authors. Hence, this writer is convinced that today the fourth amendment is treated merely as an historical artifact. Its original protection against unreasonable searches and seizures has been drastically reduced over the past few years.

The infiltration of drugs into our society is a social change wrought with costs. The costs are great in that the war against drugs

permeates every aspect of our daily lives. Undoubtedly, there are social, economic and political costs. However, the changing times and warranted attention on the expansive drug dilemma does not warrant judicial activism solely as the result of changes in political climates. Justice Holmes was wise enough to warn the Court about falling into such traps. But, unfortunately, our current Court was not inclined to heed his cautionary statements. Consequently, individuals will no longer be assured of protection against unreasonable searches and seizures. That is, what was once crystal clear, an individual's right to protection from unwarranted searches and seizures, has now been made uncertain.

Let us hope that this immediate overwhelming interest in the war against drugs does not continue to result in the sacrificing of the fundamental rights of individuals, all for the sake of the whole. After all, isn't the whole only the sum of its parts?

*Bret Lubic*